

(Lord Coalston Reporter.)

INFORMATION

F O R

Alexander Blackwood Merchant in *Edinburgh*, Pursuer; ^K

A G A I N S T

John Cathcart of *London*, Merchant, Defendant.

THE Statute Laws of *England* respecting Bankrupts, which have been the Work of Ages to bring them to that Maturity in which they now stand, have two capital Points in View; 1st, In the Way of Mercy to provide for the Relief of those unhappy Objects, who, by Misfortunes in Trade and otherways, were reduced to a State of Insolvency; 2^{dly}, In point of Justice, to compel them to make a fair and full Discovery and Surrender of their whole Estate, Means, and Effects, for Behoof of their just and lawful Creditors.

Upon a complex View of these Statutes, it appears, that upon the Bankrupt's submitting to be examined by the Commissioners

missioners of Bankruptcy, making a fair Discovery and Surrender of his Effects, and delivering up to the Commissioners, or their Assignies, the Title Deeds of his Estate, his Compt Books and other Writings; and thereupon obtaining from the Assignies and a certain Number of his Creditors, a Certificate of his having complied with the Requisites of the Law, and the Certificate being allowed of by the Lord Chancellor, he is not only released and discharged of all his prior Debts, both as to his Person and after Acquisitions, but in certain Events is also entitled to a certain Dividend, Share, or Proportion of his Effects.

And, on the other Hand, if upon the Commission's of Bankruptcy being issued against him, he did not surrender himself to the Commissioners, or refused to be examined upon Oath, or, upon his Examination, refused to discover his Effects, and to deliver up these his Effects, and all Books and Writings relating thereto, as shall be in his Power, or shall conceal or embezzle his Estate to the Value of 20 *l.* or his Books of Accounts or Writings relating thereto, *with Intent to defraud his Creditors*, he is deemed guilty of Felony without Benefit of Clergy.

To this Purpose, by the Statute 5th George II. Cap. 30. § 1. it is specially enacted, " That if any Person who shall become
 " Bankrupt, and against whom a Commission of Bankrupt
 " under the Great Seal shall be issued, whereupon he shall
 " be declared Bankrupt, shall not within forty-two Days after
 " Notice in Writing left at the usual Place of Abode of
 " such Person, or personal Notice, in case such Person be in
 " Prison, and Notice in the *London Gazette*, surrender himself
 " to the Commissioners, and subscribe such Surrender, and
 " submit to be examined upon Oath or solemn Affirmation,
 " and conform to the Statutes concerning Bankrupts; and,
 " upon his Examination, discover all his Effects, and how he
 " hath disposed of his Effects (and all Books and Writings
 " relating



“ relating thereunto) of which he was possessed, or interest-
“ ed, or whereby such Person, or his Family, hath or may
“ expect any Possibility of Advantage; and also, upon such
“ Examination, deliver up unto the Commissioners such Part
“ of his Effects, and all Books and Writings relating thereto,
“ as shall be in his Power; then the Bankrupt, in case of De-
“ fault in not surrendering and submitting as aforesaid, *or in*
“ *case he shall conceal or embezzle his Estate to the Value of 20 l.*
“ *or any Books of Accompts, or Writings relating thereto, with*
“ *Intent to defraud his Creditors* (and being convicted by In-
“ dictment or Information) shall be deemed guilty of Felony
“ without Benefit of Clergy.

This Severity was both just and necessary to attain the Ends proposed; and as the Essence of the Offence thereby created consists in the fraudulent Purpose and Intention in secreting and concealing the Effects to the Value at least of 20 l. with a View to defraud his Creditors, it shall fairly be admitted, that in order to convict the Bankrupt of this Offence, and to subject him to so high a Punishment, the bare Concealment, without Proof of the fraudulent Purpose and Intention, would not be sufficient.

But, on the other Hand, as a Compliance with the Requisites of the Law in all the Articles above-mentioned, and more particularly, a full and fair Discovery and Surrender of all the Bankrupt's Estate, Means, and Effects, was necessary to entitle him to the Benefits and Advantages intended for him by the aforesaid Statutes; it was a just Consequence, that the concealing, and not surrendering, any Part of these, without Proof of any fraudulent Intention, further than what the Law might presume from the Concealment itself, should deprive him of the Benefits and Advantages to which he would otherways have been entitled by Means of the aforesaid Certificate.

To this Purpose it is by the aforesaid Statute of the 5th of his late Majesty, *in terminis*, enacted, “ That in case any
“ such

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“ such Bankrupt shall afterwards be arrested, prosecuted, or
“ impleaded for any Debt due before such Time as he became
“ Bankrupt, such Bankrupt shall be discharged upon com-
“ mon Bail, and shall, and may plead in general, that the
“ Cause of such Action or Suit did accrue before such Time
“ as he became Bankrupt, and may give this Act and the spe-
“ cial Matter in Evidence ; and the Certificate of such Bank-
“ rupt’s conforming, and the Allowance thereof, according to
“ the Directions of this Act, shall be, and shall be allowed
“ to be sufficient Evidence of the Trading, Bankruptcy, Com-
“ mission, and other Proceedings precedent to the obtaining
“ such Certificate ; and a Verdict shall thereupon pass for the
“ Defendant, *unless the Plaintiff, in such Action, can prove the*
“ *said Certificate was obtained unfairly, and by Fraud ; OR unless*
“ *the Plaintiff, in such Action, can make appear any Conceal-*
“ *ment by such Bankrupt, to the Value of 10 l.*” So that, as well
from the Words as from the manifest Purpose and Intendment
of this last mentioned Clause, upon Proof brought that the
Certificate was unfairly, or fraudulently obtained ; or, 2dly,
That the Bankrupt had concealed his Effects to the Value of
10 l. he was not to be entitled to any of these Benefits or
Advantages ; nor was the Certificate to furnish any Defence
against a Prosecution at the Instance of any of his prior Cre-
ditors for Payment of their just and lawful Debts.

John Cathcart and *John Blackwood*, of *London*, Merchants,
for a Course of Years carried on a Co-partnery Trade at *Lon-*
don, to a great Extent. The Situation of the Company’s
Affairs, and the Pursuer’s Connection with one of the Part-
ners, occasioned their having frequent Recourse to the Pursu-
er’s Friendship, which he exerted towards them in a very e-
minent Degree, to the Hazard and Risque of involving him-
self in that Ruin, which was at Length the Fate of this Co-
partnery. He is at this Moment Creditor to *John Blackwood*,
in a separate Debt of 700 l. *Sterling*, of which he has not
the Prospect of recovering one Penny ; and the two Partners
became

became jointly Debtors to him in the following Sums, which are the Subject of this Process.

The first of these is a Bond for 612 *l.* 11 *s.* *Sterling*, bearing to be borrowed Money, granted by the Partners to the deceased *Thomas Blackwood*, Merchant in *Edinburgh*, to which the Pursuer became entitled, as in Right of the said *Thomas Blackwood*. And it is a known Fact, which cannot be denied, that the onerous Cause of this Bond was, that the said *Thomas Blackwood*, who had been several Years settled at *Carthage*, in the South Sea Company's Service, purposing to leave that Country, did remit from thence a considerable Part of his Effects, consigned to the said *John Cathcart* and *John Blackwood*. That upon his Return to *Britain*, and settling Accompts with them, as they confessed themselves Debtors to him, in the above mentioned Balance of 612 *l.* 11 *s.* *Sterling*, he received their joint Bond for that Sum, of which there remained due, as by another fitted Accompt, 11th *July* 1737, a Balance of 171 *l.* 10 *s.* 10 *d.* *Sterling*, of which not one Farthing, either of Principal or Interest, has been paid.

1st Debt,
March 9th,
1735-6.

The second of these is a Bond for 1000 *l.* *Sterling*, granted by the said *John Cathcart* and *John Blackwood*, to the Pursuer himself, conditioned for the Payment of 553 *l.* 15 *s.* 3 *d.* *Sterling*, of which there remained upon the 24th *July* 1744, a Balance of 52 *l.* 18 *s.* 2 *d.* *Sterling*; and which, with Interest from that Day, is still due: And the History of this Debt is explained by the Condition of the Bond itself, to have been, that of the same Date, the Pursuer, at the special Instance and Request, and for the only proper Debt of the said *John Cathcart* and *John Blackwood*, bound himself to pay unto *George Friar* of *London*, Merchant, the above mentioned Sum of 1000 *l.* *Sterling*, conditioned for the Payment of 553 *l.* 15 *s.* 3 *d.* From which it is apparent, that the Bond now sued on, was granted for the Pursuer's Indemnification of the Bond he has

2d Debt,
Sept. 15th,
1739.

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granted.

granted to *Friar*, for the proper Debt of these Partners: And as the Pursuer was compelled to make Payment of his own Bond to *Friar*, the Justice of this Article cannot be impeached.

3d Debt,
9th June,
1744.

The *third* and *last* Debt, is *John Cathcart* and *John Blackwood*'s joint Bond to the Pursuer, for 592 *l.* 16 *s.* *Sterling*. The History of which is, that *Robert Douglas* and *John Blackwood*, previous to the Year 1727, had been in Use to deal in drawing and re-drawing upon one another; in the Management of which, the Pursuer had been employed by *Robert Douglas* only; and therefore, opened no Account in relation to that Affair, either with *John Blackwood* or *John Cathcart*, jointly or separately, but singly with *Robert Douglas*.—In the Year 1727, *Robert Douglas* failed in his Circumstances, when the Pursuer being employed by *John Blackwood* in the Circulation, did then, for the first Time, open an Accompt with him in Relation thereto, and continued the same till the Year 1729, when the Circulation entirely ceased.—Thus Matters continued, till about the Beginning of the Year 1737, when the Pursuer was very artfully drawn in by the Defender, to accept sundry Bills, which he, under the Firm of the Company, had taken the Liberty to draw, promising Remittances for duly discharging the same, first out of one Fund, then out of another, tho' this eventually proved a mere Amusement and Deceit: And, as no Remittances were made to discharge those Bills, the Pursuer was obliged to re-draw upon them for his Indemnification, which, of new, embroiled him in a Circulation of Bills, upon Account of those Partners, who drew him on, Step by Step, by Assurances of Remittances, as will appear from their Letters in Process, of which Excerpts are subjoined.

Upon the 3d of *April* 1740, *John Cathcart* transmitted to the Pursuer a State of their Accompts, by which a Balance only of 316 *l.* 4 *s.* 6 *d.* *Sterling*, was acknowledged to be due by them

them to him; and this Accompt was accompanied by a Letter relative thereto, holograph of *John Cathcart* himself, both which are produced.—The Pursuer did, with Reason, complain, that Justice had not been done him in the aforesaid Accompt, as he was neither allowed the usual Commission of a Half *per cent.* for negotiating their Bills, nor had they even allowed him Interest for the Money he was in Advance for them; which two Articles made a Difference of about 281 *l.* 10 *s.* *Sterling*, upon the whole Accompt. And having authorised his Attorney at *London* to sue them for Payment of the Balance justly due, they settled Accompts, and granted their joint Bond for the acknowledged Balance of 592 *l.* 16 *s.* *Sterling*.

The Slur that has been endeavoured to be thrown upon these Debts, tho' the Justice of them is not impeached, rendered it necessary for the Pursuer to trouble your Lordships with this Account of the Rise and Progress of each, that no Impression might remain, prejudicial to that Claim which the Pursuer now makes for Payment.

The Defender has been extremely liberal in Encomiums upon himself, and exhibits a List of Debts contracted before the Bankruptcy; and which, he says, he has paid since obtaining the Lord Chancellor's Certificate, to the Amount of 2479 *l.* 13 *s.* 5 *d.* *Sterling*. At the same Time, he confesses, that he has not paid, nor intends to pay one Farthing to Accompt of the Pursuer's Debt, tho', at least, equally onerous as any of those that are said to have been paid: And as an Apology for this partial Preference, he took the Liberty to aver and say, that he was, in Effect, but Cautioner in the Pursuer's Debt, for his Partner, *John Blackwood*, the Pursuer's Brother, and therefore, had left it to *John Blackwood*, for whose Sake this Debt was contracted, to take Course therein.

And the Account he gives of this Matter is, that *John Blackwood*, before entering into Co-partnery with him, was engaged

ged in a dangerous Course of drawing and re-drawing, by *Robert Douglas of Barbadoes*; who, having purchased an Estate in *Scotland*, before he got Payment of the Price of Lands which he had sold in *Barbadoes*, had no Method to raise Money for paying the Price of the *Scotch* Estate, but by circulating Bills of Exchange, between *London* and *Edinburgh*. That when he entered into Co-partnery with *John Blackwood*, it was agreed, he was to take no Concern in this Circulation of Bills: That their Co-partnery was only to respect the *Jamaica* Trade, and with the *Spanish* Settlements, but that he was afterwards prevailed upon by his Partner, to lend his Name to many of these Bills, under the Firm of the Company: And that it was the Loss arising from this destructive Circulation, had involved them in many Debts, and, amongst others, in those now claimed by the Pursuer.

But, as your Lordships must be sensible, from the above State of Facts, that the two Debts first above mentioned, did arise from quite different Causes, and had nothing earthly to do with the aforesaid Circulation, it was but an unfair Attempt in the Defender, to endeavour to throw this Slur upon the Pursuer's whole Debts: So that, was there either Truth or Relevancy in the Allegation, it could, at most, only affect the third Debt, tho', in reality, it has as little to do with that as with any of the others. For as the Circulation between *Blackwood* and *Douglas*, was quite at an End in the Year 1729, the new Circulation was not begun sooner than the 1737, when the Pursuer was ensnared to accept the Bills drawn upon him by the Partners, to support their Credit, upon the Assurances of immediate Remittances. This is clearly instructed by the Defender's holograph Letters in Process, Excerpts of which have been above referred to.

And where that is the Case, what was meant as an Apology for this apparent Partiality and Injustice, must recoil with double Force.

The Pursuer has no Access to know what Truth there is in those Payments, which the Defender pretends to have made
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to the other Creditors. The Fact is no ways vouched, and if material to the Cause, cannot be credited upon the Defender's bare Averment. The Pursuer has indeed been told, that the Defender since his emerging from a State of absolute Bankruptcy to a State of unexpected Opulency and Riches, has been so condescending as to compound with some of his favourite Creditors, but has not made just Payment to any one. But be that as it will, as his Capacity and Ability to do full Justice to his Creditors will not be denied; and as notwithstanding thereof, he persists in refusing to do that Justice to the Pursuer which he says he has done to the other Creditors, and which by the Ties of Honour and Conscience he was bound to do to them all equally; now that he is in such opulent Circumstances, the Pursuer cannot be blamed for taking every Remedy the Law gives him to force Payment of this just Debt, and such is the Scope of the present Process.

When the Action came to be insisted in before the Lord Ordinary, as no Objection lay to the Debts themselves, the Defender rested his Defence upon the Certificate which he and his Partner had obtained from the Lord High Chancellor of *England*, upon the Commission of Bankruptcy issued against him in the 1745, certifying their Compliance with the Requisites of the several Statutes in that Behalf made, in the Discovery and Surrender of their Effects to the Assignies under the Commission of Bankruptcy, and consequently of their being thereby released and discharged of all antecedent Debts.

It was on the other Hand contended for the Pursuer, that the Defender had lost the Benefit of that Certificate, in respect it appeared that he had not made a fair and full Discovery and Surrender of his whole Estate and Effects to the Commissioners of Bankruptcy or their Assigns; that he had concealed the only two heritable Subjects he had in this Country specially condescended upon, far exceeding the Value of 10 l.

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And therefore, that in Terms of those very Statutes he remained still subject to the Payment of his just and lawful Debts, and could not plead the aforesaid Certificate in bar of the present Action.

The Defender replied, and endeavoured in the best Manner he could, to exculpate himself from any fraudulent Concealment of either of the two Subjects condescended upon.

The Lord Ordinary took the Debate to report. Informations, additional Informations, Replies and Duplies, containing the Opinions of *English* Council taken on both Sides were exhibited. And as the Defender in his Information disputed the Value of the Lands of *Glendusk*, one of the Subjects with the Concealment of which he was charged, a Proof before Answer was allowed as to the Value and Rental of these Lands; which Proof being remitted to the Lord Ordinary, his Lordship is now to report the whole Cause: In the View of which, this Information is humbly offered on the Part of the Pursuer.

And as he must fairly confess, that the Proof of the supposed surplus Value of those Lands of *Glendusk*, beyond the 300 *l.* which the Defender had admitted to be their just Value, has not answered Expectation; and as a few Pounds more or less will not influence the Decision of this Cause, he is unwilling to enter into any unnecessary Altercation. And therefore, submitting to your Lordships the probable Evidence, tho' in a great Measure Conjecture, of the higher Value of those Lands of *Glendusk*, than the 300 *l.* at which the Defender was pleased to estimate them, he will in the Sequel of the Argument suppose them to be of no higher Value.

In the later Proceedings before the Lord Ordinary, Discovery was made of a third Concealment at the Time of the Surrender, viz. a Sum of 48 *l. Sterling* of Arrears then due to the Defender of his Half Pay, as Director of the Hospitals.

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As the Statute 5^{to} Georgii II. requires that the Discovey and Surrender should be made upon Oath, "not only of the
 " Estate and Effects themselves whereof the Bankrupt was
 " possessed, or any ways interested in, or intitled to, and of
 " all Books, Papers and Writings relating thereto, or where-
 " by he, or his Family had, have, or may expect any Profit,
 " Possibility of Profit, Benefit or Advantage whatsoever."

So it appears from the Copy produced of the Affidavit emitted by the said *John Cathcart* and *John Blackwood* upon their Examination, that they did upon their Oaths say, "That the
 " Books, Papers and Writings therein mentioned, as then
 " exhibited with those that had been formerly seized by Vir-
 " tue of said Commission, or delivered to the said Commis-
 " sioners Messenger, and now in the Hands, Custody and
 " Power of the Assignies, &c. *do contain a true and full Dis-*
 " *closure and Discovery of all these Examinants Effects and E-*
 " *states, real and personal, and how and in what Manner, to*
 " *whom, and upon what Consideration, and at what Time or Times*
 " *they have disposed of, assigned, or transferred any of their Goods,*
 " *Wares, Merchandizes, Monies, or other Estate and Effects;*
 " and all Books, Papers and Writings relating thereto, of
 " which these Examinants were possessed, or in, or to which
 " they were any way interested or intitled, or which any
 " Person or Persons had, or hath, or have had in Trust for
 " them, those Examinants, or for those Examinants Use, at
 " any Time before, or after the issuing of said Commission,
 " or whereof those Examinants, or their Families, have, or
 " hath, or may have, or expect any Profit, Possibility of
 " Profit, Benefit or Advantage whatever.—And these Exa-
 " minants further say, that they have at this the Time of
 " their Examination, delivered up to the said major Part of
 " the Commissioners by the said Commission authorised, all such
 " Part of their Goods, Wares and Merchandizes, Money, E-
 " state and Effects, and all Books, Papers and Writings re-
 " lating thereto, as now at this the Time of their Examina-
 " tion,

28th Sep.
1745.

“ tion, they have, or are in their Possession, Custody or Power.
 “ And further say, that they have not removed, concealed or
 “ embezzled any of their Effects or Estates, real or personal,
 “ or any of their Books of Accompts, Papers or Writings
 “ relating thereto, with an Intent to defraud their Cre-
 “ ditors.”

19th Nov.
 1748.

And from the Copy of the Report made upon Oath by the
 Assignies under the Commission, of the Amount and Proceeds
 of the Bankrupts Effects surrendered to them, they certify,
 “ That the separate Estate for Life of the said *John Black-*
 “ *wood*, of, and in the several Messuages, Farms and Lands
 “ in the County of *Kent*, was sold under the said Commission
 “ to Mr. *Patoun*, for the Sum of 2400 *l.* which he paid, up-
 “ on these Examinants executing a Conveyance thereof to
 “ him: And this Examinant *Henry Vanderstegen* saith, that
 “ he hath received 1200 *l.* Part of the said Sum of 2400 *l.*
 “ the Purchase Money aforesaid, and the same now remains
 “ in his Hands, and is all that this Deponent hath received
 “ for, or on Account of the said Estate and Effects of the
 “ said Bankrupts, or either of them.” And this Examinant
George Arnold saith, “ That he hath received the Sum of
 “ 1200 *l.* the Remainder of the said Purchase Money, and
 “ the same is now in the Hands of the Examinant.” And
 this Examinant further saith, “ That he hath also received of
 “ Mr. *Benjamin Adamson*, Executor of Mr. *Thomas Adamson*,
 “ the Sum of 8 *l.* 0 *s.* 5 *d.* being the Balance of the Ac-
 “ count of the said *Thomas Adamson*, which said two Sums of
 “ 1208 *l.* 0 *s.* 5 *d.* are, and is all that this Examinant hath re-
 “ ceived on Account of the Estate and Effects of the said
 “ Bankrupts, or either of them, except some loose Papers,
 “ Books and Lumber, which are useless, as this Examinant
 “ believes: And both these Examinants say, that the said se-
 “ veral Sums of Money, so by them received as aforesaid, do
 “ belong to, and are Part of the separate Estate of the said
 “ *John Blackwood*: And both these Examinants, each speaking
 “ for

“ for himself, saith, that they have not received any Sum or Sums
 “ of Money, Goods or Effects, as, or on Account of the separate
 “ Estate of the said John Cathcart; or as, or on Account of the
 “ joint Estate of the said John Blackwood and John Cath-
 “ cart.”

The Defender does not dispute, that this Report by the Assignies under the Commission, contains a fair Account of the total Produce of the Surrender made by these Bankrupts; and where that is the Case, the Pursuer will be pardoned to say, that it is as great a Burlesque upon so serious a Matter, as has at any Time appeared: Their whole Effects, either as Partners or Individuals, other than the Estate for Life of *John Blackwood*, which sold for 2400 *l.* amounted to 8 *l.* 5 *d.* the separate Estate of the said *John Blackwood*. As Partners, they had neither Money, Goods nor Effects; nor as Individuals, had they one Six-pence other than the said 8 *l.* 5 *d.* So that, laying *John Blackwood* out of the Case, the Defender *John Cathcart* neither discovered nor surrendered any Thing, and says he had nothing to surrender, tho’ the Debts they were owing were to a very great Extent. And if it shall now appear, that the three Subjects which the Pursuer thinks he has discovered to have belonged to the Defender at the Time of this Surrender, were concealed, and no Discovery or Surrender thereof made, it must be submitted to your Lordships, whatfor an Appearance it has in a Case of this Nature, that the only Subjects which this Defender had in the World which could have been beneficial to his Creditors, were suppressed and concealed.

Cases may be figured, where in a Surrender by Bankrupts to any Extent or Value, some few Particulars of lesser Moment may escape Observation; and whether, upon Proof that this proceeded not from any designed Concealment, but by Oversight or Neglect, Equity might interpose to mitigate the Severity of the Law, the Pursuer will not take upon him to say. The Law has made an Allowance to the Amount of 10 *l.* of

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which

which it takes no Notice, upon a Presumption, that to this Extent the Concealment might have been innocent, or undesigned, but has given no Power to Judges to admit of any Excuse, where the Concealment is proven to a greater Extent. But where the Discovery and Surrender appears to be a mere Farce, as in this Case, where nothing is discovered, and every Thing concealed, it would be of dangerous Example to admit of any Apology, to secure to the Bankrupt the Enjoyment of those Benefits and Advantages, which were intended for those only, who should make a fair and full Discovery of their whole Effects.

If the Concealment does not exceed the Sum of 10 *l. Sterling*, the Law takes no Notice of it; but where it goes beyond that Sum, as the Law could not suppose so great a Degree of Inattention on the Part of the Bankrupt in a Matter of that Consequence, it requires no Proof of the Concealment's being fraudulent, or done *intuitu* to defraud the Creditors; but, without Enquiry, by what Means, or from what Causes the Concealment proceeded, statutes upon the Fact, and denies the Bankrupt these Benefits and Advantages which otherways he would have been intitled to by Means of the Certificate, particularly, of being released and discharged of all antecedent Debts.

So standing the Law, it remains to state the Particulars of this Concealment, and what has been pleaded by Way of Defence upon the several Articles.

The three Particulars which the Pursuer condescends upon, are, 1st, A House in *Edinburgh*, being the upper Story of a Land at the Head of *Foulis's Close*, which, at the Time of the aforesaid Surrender in 1745, yielded 8 *l. Sterling* of yearly Rent.—2^{dly}, The Lands of *Glendusk*, lying in the Shire of *Air*, admitted by the Defender to have been worth 10 *l. Sterling* of yearly Rent; and which, according to the Estimation he puts upon them of 30 Years Purchase, brings out the total Value of these to be 300 *l.*—3^{dly}, The Sum of 48 *l. Sterling*

Sterling due to the Defender, as the Arrears of his Half-pay as Director of the Hospitals.—Of these in their Order, beginning with the House in *Edinburgh*, which the Pursuer has placed in the Front, as he imagines the Proof of a designed Concealment of this Arricle to be clear and indisputable, and the Apology that has been attempted to be neither relevant nor proven. So that was there no more in the Cause, this of itself would be sufficient *ad victoriam*; it is not left to Courts of Justice to dispense with the positive Enactment of the Law upon any By-Considerations, however favourable; tho', if favourable Considerations were to enter the Question, they stand clear for the Pursuer, who claims Payment of a most just Debt from a wealthy and opulent Debitor: And the Statute 21st *James I. cap. 19.* expressly directs, "That the Statutes relating to Bankrupts shall be construed in the most beneficial Manner for Creditors."

It is an agreed Fact, that this House, as well as the Lands of *Glendusk*, was Part of the Defender's Father's heritable Estate; that it devolved to the Defender upon his Father's Death, as far back as the Year 1729; that the Title Deeds of it have been, and still are in the Possession of the Defender or his Doers; that he has never sold or disposed it to any Person whatever, and tho' he has not hitherto completed the feudal Right in his Person, there is undeniable Evidence that the Rents of it, for at least 30 Years past, have been uplifted in virtue of Powers or Factories from him, and disposed of as he was pleased to direct; and he has judicially acknowledged, that he made no Discovery or Surrender of this House to the Commissioners of Bankruptcy.

House in
Edinburgh.

Was the Defender now sued upon the passive Titles, as representing his Father, for Payment of his Father's Debts, it is believed it could not admit of a Question, that, upon Proof of the above mentioned Facts, he behoved to be concluded in an universal passive Title, or that this Subject was adjudgeable from

from him, as charged to enter Heir to his Father, for Payment of his own Debts, as in Fact it has lately been so adjudged.

And where that is the Case, the Pursuer would be pardoned to say, it would be very extraordinary if his withholding this Subject from the Discovery and Surrender he pretended to make, were to be flurred over; or the Cobweb Excuses that are here offered allowed of, so as still to entitle him to all the Benefits and Advantages which the Law intended as a Reward to those only, who should appear to have made a full and fair Discovery.

The Apology which the Defender offers for having made no Discovery or Surrender of this Subject to the Commissioners of Bankruptcy, is, that long before that Time he had given up this Subject, both verbally and by Letters to his Sister lately deceased, who was married to Mr. *Campbell* Minister at *Dennoon*; and tho' he had made no formal Conveyance thereof, yet as he had never received any of the Rents from his Father's Death, so he understood that he had no Sort of Right or Interest, after what had past between him and his Sister; and it did not occur to him that he was bound to surrender a Subject which he understood and believed to belong to his Sister, by a most just Title; and if he erred in Law, that Error ought not to be construed a wilful Omission or Concealment, of Intention to defraud his Creditors.

It will not require many Words to satisfy your Lordships of the Irrelevancy and Insufficiency of this Excuse, unless it could be alledged and proven, that by some obligatory Writing, whether by Letter or otherways, he had conveyed, or become bound to convey the Property of this Subject to his Sister: A verbal Promise, tho' proved, could have been of no Avail against a supervening Bankruptcy, to the Prejudice of Creditors who were entitled to have a full Surrender of every Estate that then belonged to the Bankrupt. No Acknowledgment of an antecedent verbal Promise could have been admitted,

ted to withdraw that Subject from the Surrender which the Law required.

But it is unnecessary to argue the Relevancy of Facts, of which there is no Sort of Proof, other than the Defender's bare Averment, now when a Discovery of this Concealment is made. Was that to be allowed of, no Bankrupt could ever be convicted of a designed Concealment. It would be the strongest Encouragement to Bankrupts to conceal their Effects, if, when detected, no more was requisite than a Tale of this Kind, that they had promised away the concealed Subjects to some one of their own Friends or Relations.

And therefore, tho' the Pursuer has no Occasion to dispute the Evidence arising from the Proof to be now stated, that the Defender did authorise or allow his Factors in this Country to apply the Rents of this Tenement, levied and intromitted with by them as his Property, partly for the Aliment of his Sister; this is so far from proving that he considered the Subject itself as his Sister's Property, that it proves the direct contrary, and renders him so much the more inexcusable, in not discovering and surrendering this Subject, where he cannot pretend Ignorance of his Right thereto; and where, as in the Sequel shall be shown, not many Months before his emitting the Oath in the Terms above mentioned, he, as Proprietor of this Subject, had granted a Factory for levying the Rents thereof.

It appears, that of this Date *David Cathcart* of *Glendusk*, the Defender's Father, granted a Commission to Mr. *Alexander Macmillan* Clerk to the Signet, empowering him to sell the House in question to the best Advantage, under this Provision, "That he shall apply the Price of said Dwelling House towards Payment of what was resting by him and *John Cathcart* his eldest Son, (the Defender) of the Sum of "1000 *l. Scots*, and Annualrents thereof, to *John Campbell* Lord Provost of *Edinburgh*, conform to their Bond, &c."

But as, in Fact, the House was never sold, it transmitted to

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the

12th Nov.

1723.

the Defender, as Part of his Father's heritable Estate, upon his Death in the 1728 or 1729; and as Mr. *Macmillan* continued to uplift the Rents till the Year 1739, tho' Mr. *Macmillan* depones, " he cannot recollect at such a Distance of " Time, whether he had any particular Commission to uplift " these Rents, other than the Commission he had to sell the " House;" yet as the foresaid Commission behoved to drop by the Father's Death, it is clear as Sun Shine, that Mr. *Macmillan's* Intromissions with the Rents after the Father's Death, must have been by Authority of the Defender, to whom these Rents belonged, and who alone had Power to grant Commission for uplifting the same, and disposing of them as he thought proper.

But the Evidence of this Fact does not rest upon Probabilities or Presumptions; for it appears that the Defender, as Proprietor of this Subject, did grant a Commission to Mr. *Macmillan*, to uplift these Rents, as belonging to him, and authorised him to apply them for the Use of his Sister.

For Proof of this Fact, the Pursuer appeals to sundry Receipts granted by Mr. *Macmillan* to Mr. *William Harper* the Tenant of that House for many Years; the first of which Receipts is in these Words, " I *Alexander Macmillan, &c.* as
 9th Dec. 1736. " *having Commission from Mr. John Cathcart Merchant in Lon-*
 " *don, grant me hereby to have received, from the Reverend*
 " *Mr. William Harper, the Sum of 12 l. Sterling, as a Year*
 " *and a Half's Rent, viz. from Whit/sunday 1735 to Martin-*
 " *mas 1736, of a House in Foulis's Close, Top Story of the*
 " *fore Street, East Side, belonging to the said John Cathcart;*
 " *and therefore, I hereby, as Factor for the said John Cath-*
 " *cart, discharge the said Mr. Harper, &c. and I oblige my*
 " *Constituent to warrant thir Presents.*"

And to show that Mr. *Macmillan* acted in the Premises conform to the Instructions he had received from the Defender, there is produced the Defender's holograph Letter, of this
 4th Sept. 1739. Date, to his Sister Mrs. *Campbell*, wherein he writes, " I doubt
 " not

" not but Mr. *Macmillan* remits you the Rents of the House
 " in *Edinburgh*, as I desired him, which in the mean time is all
 " that I can do for you, and when I can do better, it will be
 " a great Pleasure to me to do it."

And in Conformity to these, there is produced a Receipt,
 granted by the said Mrs. *Campbell*, acknowledging her to have
 received, by the Hands of the Reverend Mr. *George Wishart*,
 one of the Ministers of *Edinburgh*, whom Mr. *Macmillan* em-
 ployed to make the Remittance, the Sum of 7 l. 7 s. *Ster-*
ling, completing one Year's Rent, as the Receipt bears, " of
 " my Brother John Cathcart's House, in *Edinburgh*, which
 " Rent is allowed by him to me."

From these three Pieces of Evidence, when conjoined,
 your Lordships perceive, the Defender himself, his Sister
 Mrs. *Campbell*, and his Factor Mr. *Macmillan*, all agree in
 one Voice in acknowledging this House to be the Defender's
 Property, the Rents thereof levied in his Name, and applied,
 by his Directions, for the Aliment of his Sister.

But the Evidence does not rest here; for Mr. *Macmillan* ha-
 ving resigned his Factory or Administration for the Defender,
 about the Year 1740, Mr. *Wishart* from that Time uplifted
 the Rents, and transmitted them to Mrs. *Campbell* so long as she
 lived. And Mr. *Wishart* has deponed, that to the best of his
 Remembrance, he uplifted the Rents from the Year 1740 to
 the Year 1744, by virtue of a Missive from the Defender, tho'
 upon looking over his Papers he cannot find such Letter.

But whatever Mr. *Wishart*'s Authority was from the 1740 Aug. 22.
 to the 1744, there appears of this Date, a very ample Fac- 1744.
 tory, holograph of the Defender himself, granted by him to
 Mr. *Wishart*, of the following Tenor, " I John Cathcart of
 " London, &c. do hereby constitute and appoint the said Mr.
 " George *Wishart* my sole and lawful Factor, for the Rents of
 " all my Houses, Tenements, &c. belonging to me within the City of
 " *Edinburgh* and Liberties thereof, with full Power, not only to
 " uplift the said Rents, but to grant Discharges for the same;
 " and

“ and to compound all Debts that may be owing or become
“ due by the Tenants, as amply as I myself could do. And
“ likewise I hereby ordain and appoint him, the said Reverend
“ Mr. *Wishart*, to pay all the Rents and Profits arising from the
“ said Houses and others, to Mrs. *Campbell* Relict of the deceast
“ Mr. *Walter Campbell* Minister of *Denoon*, my lawful Sister,
“ for sundry Reasons thereunto me moving, declaring, that her
“ Receipt shall be sufficient for his Exoneration, &c.”

Feb. 17.
1759.

Mr. *Wishart* has deponed, that in virtue of this Factory, he has ever since uplifted and applied the Rents. His Receipts to Mr. *Harper*, &c. the Tenants, do uniformly describe the House as belonging to Mr. *Cathcart* the Defender. And since Mrs. *Campbell's* Death, the Defender, by a Letter in Process of this Date, has directed Mr. *Wishart* to pay these Rents to Mrs. *Campbell's* Daughter.—One of these Receipts dated so late as the 5th of *December* 1759, shall be inserted here by Way of Specimen to your Lordships. “ I Doctor *George Wishart*, one
“ of the Ministers of *Edinburgh*, Factor for Mr. *John Cathcart*, Merchant in *London*, grants me to have received from
“ Miss *Ann Congalton*, 6 l. 6 s. Sterling, being a Year's Rent
“ due at *Whitsunday* last, of an House possessed by her, belonging to the said Mr. *John Cathcart*, the top Story of the
“ fore Land, at the Head of *Foulis's* Clofs, entering by the
“ East Side of the said Clofs. And therefore, I as Factor fore-
“ said, do hereby discharge the said Miss *Ann Congalton*, and
“ all whom it may concern, of the said Year's Rent, and all
“ preceeding the same. In Witness whereof, &c.”

Upon this State of the Evidence it appears, that tho' the Property of this House is confessed as well as vouched to have belonged to the Defender at the Time of the Bankruptcy, and for many Years before, as it does at this Day, no Discovery or Surrender, nor the least Mention of it was made upon his Examination. These Facts stand confessed, and his Excuse is, that before the Bankruptcy, he had given up this Subject both verbally and by Letters to his Sister. This he proves by
his

his own Averment: No Disposition or Conveyance of the Property was ever granted: No Obligation, or even Promise is attempted to be proven; it was therefore as much a Part of the Defender's Estate at the Time, as it possibly could be. The Letters, Receipts of Rent and Factory, all justly and uniformly describe the House as belonging to him, and acknowledge no other Right in Mrs. *Campbell*, but a precarious Enjoyment of the Rents pendent on his Will.

It surpasses all Credulity, that the Defender could be so much deceived as to imagine, that his applying his own Rents during Pleasure to the Support of his needy Relations, should denude him of the Subject itself, out of which the Rents are produced. The Pursuer does not desire to aggravate a Matter of this Sort, which seems so clear. But when it is considered, that he had granted the aforesaid Factory to Mr. *Wishart*, no earlier than *August 1744*, for uplifting the Rents of this House, as belonging to him, it would require a strong Degree of Credulity, that this should have escaped his Memory when he came to make the Surrender in *September 1745*, when a full Discovery was required and expected. *Ignorantia juris* is not pleadable; but it is plain there could be here no Pretence for Ignorance of any Kind, as he not only knew this Subject to belong to him, but granted Factories over it to levy the Rents, and appointed these to be applied as he directed, and which he continued to do even after his Sister's Death. Whether the Defender may have intended to make a Compliment of this House to his Sister, or not, he himself can only know. The Tale is improbable, as during that long Course of Years no such Deed was ever granted, or any Writing executed that had the smallest Tendency that Way; on the contrary, his whole Conduct throughout was the very Reverse; he acted as Proprietor, and his Sister acknowledged the Property to be his. So that to conclude upon this Article, there is as clear a Proof as can be expected in any Case, not only of an actual Concealment, but that it was done purposely,

posely, and of Design, to withdraw this Subject from the Discovery and Surrender he was in Appearance to make ; and if that does not bring him under the Exception of the Statute, it will be hard to conceive any Case where the like Excuse may not be set up.

Lands of
Glendusk.

And with respect to the Lands of *Glendusk*, which makes the second Article of Concealment, it stands in like Manner confessed, that these Lands being Part of his Father's Estate, devolved upon the Defender by his Father's Death before the Year 1730, but that he allowed his Uncle *Robert Cathcart* Possession of them, as in his Right, without any Transfession or Alienation of the Property.

Your Lordships have already heard, that upon the Defender's Examination before the Commissioners, he made Oath, That the Papers and Books therein mentioned, contained a true and full Disclosure of all his Effects and Estates, real and personal, to which he was any ways interested or entitled, &c. And from the Oath of the Assignies, specifying the Sums and Effects received by them from the Bankrupts, that no Notice whatever is taken in either of these of the Lands of *Glendusk* ; which is the strongest negative Proof that no Disclosure or Discovery was made of these. If any such Discovery had been made, the Title Deeds, and other Writings relating to these must have been delivered up ; nor could the Assignies, without a manifest Breach of Trust, have overlooked this Subject, if it had been discovered.

The Defender endeavours to supply this Defect, by an Affidavit, which he was pleased to make *pendente processu* before a Magistrate at *London*, importing, " That on his Examination before the Commissioners and Assignies of his Bankruptcy, he made a *full* Discovery of his whole Estate, real and personal, particularly of the Farm of *Glendusk* in *Scotland*, " *which was at that Time the only, and all the real Estate he had, or was entitled to* : That the same Farm was *seized upon* by " *Thomas Kennedy*, for a Bond Debt which he the Deponent

" and

“ and *John Blackwood* owed him : That it might be of the
 “ Value of 10 *l.* a Year, and that the Produce of it, if sold,
 “ would not satisfy and pay the said Debt.” And *John Black-*
wood in his Affidavit, says, “ That he was present at the Ex-
 “ amination of the said *John Cathcart*, and did hear him ac-
 “ quaint the Commissioners and Assignies, that he had a small
 “ Estate in *Scotland*, which was adjudged by the Law there,
 “ to one *Thomas Kennedy*, for a Sum larger than the Value of
 “ said Estate or Farm.”

The Pursuer begs Liberty to doubt, whether parole Evi-
 dence, even by the most unexceptionable Witnesses, other
 than the Commissioners themselves, can be allowed of as a
 competent Mean of Proof for establishing a Fact of this Kind.
 The Proceedings of these Commissioners, and of the Assign-
 ies, are all taken down in Writing, and from these the As-
 signies make their Report, which they verify upon Oath.

But supposing, for Argument's Sake, that such a Discovery
 had been made, as the Defender sets forth in his Affidavit, the
 Pursuer is advised, and submits it to your Lordships, that it
 was not such as the Law required, and therefore, that the De-
 fender can take no Benefit or Advantage therefrom. The Law
 requires, that the Bankrupt should not only discover every Es-
 tate he is possess of, and the Title Deeds or Writings relative
 thereto, but that these should be surrendered and delivered up
 to the Commissioners, for this plain Reason, that the Discove-
 ry of an Estate can be of no Significancy, if the Writings and
 Title Deeds are withdrawn and with-held. And the Pursuer
 must be further pardoned to say, that the Defender has been
 rather too incautious in the wording of this Affidavit, emit-
 ted during the Dependence of this Process, where he again
 deposes, that this Farm of *Glendusk* was at that Time the on-
 ly, and all the real Estate he had, or was intitled to ; when, as
 your Lordships have already heard, and stands confessed, he
 had the very same Right to the House in *Edinburgh*, as to these
 Lands of *Glendusk*.

But

But allowing the Discovery to have been such as the Defender sets forth in the aforesaid Affidavit, it is so far from answering the good Intention and Purpose of the Law, that it would rather seem to have been intended as a Blind to the Commissioners, and to prevent their making any Enquiry after a Subject which he represented to be so much worse than nothing.

He lets out with informing, that this Farm of *Glendusk* was seized upon by *Kennedy*, for a Debt above its Value; or, as *John Blackwood* expresses it in his Affidavit, that it was adjudged by the Law of *Scotland* to *Kennedy*, for a Sum larger than the Value.

This was a most deceitful Misrepresentation in many Respects; for in the *first* Place, *Kennedy's* Adjudication was not worth a Six-pence, as it proceeded without any special Charge to adjudge an Estate which remained in *hereditate jacente* of the Defender's Father, and to which the Defender had made up no Title; so that, instead of being available as a Title of Property to carry off these Lands, the Adjudication was totally void and null.

The Defender may possibly pretend, that he was ignorant of this Nullity of the Adjudication: But the Answer is obvious, *1st*, That the Law does not presume Ignorance: *2dly*, He ought not to have taken upon him to give so favourable a Representation of this Adjudication, as sufficient to carry off the whole Lands, unless he had had certain Knowledge or Information, whether the Adjudication had been regularly or irregularly deduced. If he had produced and delivered up the Title Deeds, as he ought to have done, every Person the least conversant in these Matters, must have seen, that an Adjudication, without a special Charge, was no better than a Sheet of blank Paper.

2dly, It was an unfair Representation of the Fact, where he averred, that *Kennedy*, upon the Title of this Adjudication, had seized upon the Lands: He is now forced to admit, that

that *Kennedy* never attained Possession ; but on the contrary, that ever since his Father's Death, he, the Defender, had allowed some of his poor Relations to possess said Farm.

3dly, It was equally unfair, when he imposed upon the Commissioners to believe, that *Kennedy's* Debt was wholly due, and that it was at least equal in Value to the Lands ; when in Fact it appears, that the Defender, by the Hands of Captain *Robert Cathcart* his Cousin, had paid *Kennedy*, antecedent to the Bankruptcy, about 80 *l. Sterling* to Account of this Debt ; and since the Bankruptcy, has paid up the Balance, and taken an Assignment to the Debt.

And your Lordships will particularly attend to the Words of *Kennedy's* Assignment of this Debt to the Defender, which is dated as early as the 20th of *August 1747*, " That seeing " Captain *Robert Cathcart* did, for Account of the said *John Cathcart*, and in order to prevent my entering upon the Possession of the said Lands of *Glendusk*, by uplifting the Rents thereof, pay to me, at two different Times, the Sum of " 80 *l. Sterling* since recovering said Decreet of Adjudication, in Part of the Interest due me on the said Debt, and " that on Account of the said *John Cathcart* ; and which 80 *l.* " hath since been repaid by the said *John Cathcart* to the said " Captain *Robert Cathcart* ; and that the said *John Cathcart* " has now by the Hands of *James Ferguson* Writer in *Air*, " made Payment to me of 229 *l.* 18 *s.* 3½ *d. Sterling*, which, " with the foresaid 80 *l.* completely satisfies and pays me of " the Sum of 200 *l. Sterling* of Principal, and Annualrents and " Expences, &c."

This Assignment of the Tenor above recited clearly proves, that 80 *l.* of the Debt had been paid to *Kennedy* by Captain *Robert Cathcart* on the Defender's Account ; and that the Defender had re-paid that Sum to the said Captain *Robert Cathcart* : And as the Defender in a Missive of this Date, addressed to the Pursuer, after mentioning his having re-paid Captain *Robert Cathcart* that Sum, adds, " *I have had no open Account*

13th Jan.
1758.

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" with

“with him since the 1745,” that is, from the Time of the Bankruptcy; it is from thence plain, that the 80 *l.* had not only been paid to *Kennedy*, but re-paid to Captain *Cathcart* before the Bankruptcy; consequently, that supposing *Kennedy*’s Adjudication had been liable to no Objection, it was not an Incumbrance in any Degree equal to the Value of the Lands, exclusive of the bygone and current Rents; so that the Concealment of this partial Payment, and representing this Adjudication as an outstanding Incumbrance for the whole Sum, equal in Value to the whole Lands, was such an unfair Representation of the Fact as cannot be justified.

The Defender, it is true, attempts to prove that Part of the Money was paid to *Kennedy*, by Captain *Cathcart* after the Bankruptcy: For Evidence of which, he produces a retired Bill, dated 1st March 1746, drawn by *Kennedy* upon Captain *Cathcart*, for 37 *l.* 10 *s.* Sterling. But the Bill itself redargues this Supposition; for by a Marking upon the Back of it, it appears that 17 *l.* 10 *s.* of that Sum was due to *Kennedy* for Wages, as Carpenter on board of the *Blackwood Gally*, of which Captain *Cathcart* had the Command; besides, that as *Kennedy* had no Title to draw a Bill upon Captain *Cathcart* for a Debt due by the Defender, this can never be presumed, unless *alimunde* ascribed.

But what must for ever silence the Defender upon this Article, is, that he has it in his Power to clear up the Fact the one Way or the other. He ought to be possessed of *Kennedy*’s Receipt to Captain *Cathcart* for the 80 *l.* which fell to be delivered up to him when he cleared with Captain *Cathcart*. He has been required to produce that Receipt, as appears from an Instrument of Protest, (Copies of which are herewith put into the Lords Boxes.) And therefore his keeping up the same must presume against him, the rather considering that he artfully avoids to condescend upon the precise Time when the 80 *l.* was paid by Captain *Cathcart* to *Kennedy*, or re-paid by him to Captain *Cathcart*, as he must know that that Payment was of Date prior to the Bankruptcy, which there-
fore

fore must bear hard upon the pretended Discovery he is said to have made of this Subject to the Commissioners.

So that to conclude upon this Article, whether the Defender shall be supposed to have made the Discovery he now pretends to have made of those Lands of *Glendusk* to the Commissioners ; it is evident that the Discovery was improper, and calculated to mislead, by a very unfair Representation of the Case.

The Pursuer came lately to discover, that upon the 28th *Half Pay.*
September 1745, the Day of the Defender's final Examination by the Commissioners of Bankruptcy, and when he emitted the Oath of the Tenor above recited, there was an Arrear due to him of his Half Pay, as Director of the Hospitals, of 48 *l. Sterling*, being the Amount of his Half Pay for 96 Days, at the Rate of 10 *s. Sterling per Day* : And tho' this Half Pay yielded no less than 182 *l. Sterling per annum*, a tolerable Income for a Bankrupt, who was to surrender nothing to his Creditors in *solutum* of their Debts ; it appears that no Notice was taken thereof, or of the Arrears due thereon, upon the Examination taken by the Commissioners. It was put to the Defender to confess or deny this Fact by a Writing under his Hand ; and as the Fact stands now confessed, the Question in Law from thence arising is, Whether the Defender was not thereby guilty of a third Concealment ?

Whatever shall be the Judgment of the Law in this Particular the Pursuer will be pardoned to think, that it had been more becoming in the Defender, not to have assumed to himself the Power of judging in his own Cause, but fairly to have stated the Fact, leaving it to the Law to determine, whether the Arrears then due upon the Half Pay should be surrendered as a Fund of the Creditors Payment.

Now that the Discovery has been made of the Fact, the Defender contends, that as his Office, *qua* Director of the Hospitals, is of the Nature of a military Office, his Pay or Half Pay ought to be considered as upon the same Footing with

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with that of any commissioned Officer, and consequently, not to be attachable by his Creditors.

The general Rule of Law stands clear for the Pursuer, that every Estate of whatever Kind, that belongs to a Debitor, ought to be attachable by his Creditors, which therefore throws the labouring Oar upon the Defender, to produce the Law which exeems the Bygones of his Salary or Half Pay as a Director of the Hospital, when he has neither Duty nor Office to attend, from the Diligence of his Creditors. It will be carrying the Exemption extremely far, if every Office, civil or military, that has a Salary or Pay annexed to it, is intitled to such a Privilege, even as to bygone Arrears, which cannot be said to be alimentary, as *nemo alitur in præteritum*.

That Office which the Defender enjoyed, as Director of the Hospitals, and, in Consideration of which, he was allowed half Pay, cannot be considered as upon the same Footing with proper military Commissions. There are Funds appropriated by the Legislature for Payment of the Army. Their Pay is deemed alimentary, and as necessary to enable them to do their Duty; and, in that Respect, may be entitled to some extraordinary Privileges: When put upon Half Pay, they get no new Commission or Warrant. The Half Pay is allowed them for Subsistence, and they are bound to answer when called upon. The Office of Director of the Hospitals, is no more a military Office, than a Commissary, or such like: It is incidental, and only necessary in Time of War: It gives no Title to Half Pay, nor has the Law made any such Provision for it: So that when Half Pay is given to one who enjoyed that Office, it is a mere Favour, and by a particular Warrant, and is paid out of Contingencies, and gives no Obstruction to the Party's following any other lawful Occupation he may be qualified for.

Under these Circumstances, it is submitted to your Lordships, whether the Arrears of this Half Pay has any Privilege to exeem them from the Diligence of Creditors; if they have

no such Privilege, the not discovering those upon the Examination, was a further Concealment.

It was argued for the Defender, that in order to give the Concealment the Effect of voiding the Certificate, it must appear to have been wilful, and done of Intention to defraud the Creditors. And was that to be the Rule of your Lordships Judgment in this Case, the Pursuer is hopeful to have made it clearly appear, that such, truly, was the Fact.

But the Pursuer will be excused to have a very different Apprehension of this Statute, and that it does, by no Means, require any Proof of a fraudulent Intention, which being *animi*, would, in most Cases, be of most difficult Probation.

The Exception to the Validity of the Bankrupt's Certificate, by the Act of the 5th of his late Majesty, already stated, consists of two Branches: It enacts, that the Certificate shall import a Discharge of prior Debts, unless the Plaintiff can prove one of two Facts; 1st, That the Certificate was obtained unfairly, or by Fraud. Or, 2^{dly}, Unless the Plaintiff can make appear any Concealment by such Bankrupt, to the Value of 10 *l*. The Particle *or*, makes clearly two distinct Alternatives, either of which, if proved, is sufficient to bring the Case within the Exception. The first Alternative respects the Certificate's being obtained unfairly, or by Fraud, which may be accomplished in many different Ways. In Opposition or Contradistinction to which, all that is required by the second Alternative, is a Concealment to the Value of 10 *l*. So that one of two Propositions must be admitted, with respect to this second Alternative, *viz*. That the Legislature either presumes such Fraud, where the Extent of the Subject concealed, exceeds 10 *l*. or that it imposes the Penalty of voiding the Certificate, where the Bankrupt, whether by Fraud or Negligence, or from whatever other Cause, has omitted to discover such a Fund, as ought to have been applied for Satisfaction of his just Debts.

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It was reasonable to suspect that Bankrupts would attempt a Concealment of their Effects, even when they pretended to make a full and fair Surrender; and therefore, as it was thought necessary, on the one Hand, to invite them to do Justice to their Creditors, by the Benefits and Advantages which would thereby accrue to themselves, it was equally necessary and just to deprive them of these Advantages, if the Surrender was not full and complete; and as the Law was willing to make Allowance for such Concealments as might be supposed to proceed from Inadvertence, or Mistake, the Boundary fixed was 10 *l. Sterling*: If it goes beyond that Sum, the Law has authorised no Enquiry from what Causes it proceeded, far less has it thrown upon the Creditors the *onus probandi*, that this Concealment was made with a fraudulent Intention; and as the Judgment, which the Pursuer now humbly expects, will have no further Consequence than to oblige the Defender to do that Justice to the Pursuer, which, he says, he has voluntarily done to severals of his Creditors, and which, by the Laws of good Conscience, he is bound to do to them all in his present State of Opulency and Riches, your Lordships will never regrette applying the Law in such a Case.

Your Lordships have been furnished with the Opinions of *English* Council on both Sides, two for the Pursuer, one for the Defender, upon the Question, Whether the Defender's Case falls within the Exception of the above-recited Statute? These Opinions shall be left to speak for themselves, though the Pursuer cannot help observing, from the Opinion of Mr. *York*, that it proceeds upon Supposition of a Fact, of which there is no Sort of Evidence, *viz.* That the House of *Edinburgh* had long before been given up to the Defender's Sister, in such Manner as that he could no longer consider it as his own Property: The contrary of which is so clearly proved, that it would be improper to repeat what has been already said on that Head.

There

There is produced another Opinion from the same learned Council, upon the Question, Whether a Bankrupt is obliged to discover an Office for Life from the Government? The Opinion does not seem to be extremely favourable for the Defence; it clearly supposes, that the Perquisites of the Office should go for the Creditor's Payment, and that the Assignies should give the Bankrupt a proper annual Allowance for executing the Office, making him to account for the Remainder of the Profits for the Use of the Creditors.

And it is to be observed, that, by an Half-pay Warrant produced, it appears, that the Money is payable *to Assigns*; so that the Defender undoubtedly had it in his Power to have surrendered Part of the Profits of his Office to his Creditors.

These Things are humbly submitted; and, upon a complex View of the whole Case, it is hoped your Lordships will be of Opinion, that the Defender in this Case cannot plead the Certificate in bar of this Action, for Payment of the Debts he is justly due to the Pursuer, and will therefore decern against him for Payment of these, in Terms of the Libel.

In Respect whereof, &c.

ALEX. LOCKHART.

Follows

Follows the Writings referred to above,
by way of APPENDIX.



N U M B E R I.

EXCERPTS of the Defender's Letters
to the Pursuer.

Feb. 21.
1737. **I**T is impossible for us to pay your Bills that are running up-
on us, without re-drawing: If our Affair with *Nicolson*
was settled (which we hope in a Month's Time to have done)
the Balance, we think, must come to us, will enable us to
strike them off without re drawing.

Aug. 11.
1737. I have drawn on you this Day 135 *l.* which I beg you'll ho-
nour, and shall endeavour to remit you for the same in due
Time, I am afraid one of 40 *l.* is gone back; it was not in my
Power to prevent it.

April 15.
1738. Our Affair with *Nicolson* is not yet ended: We are obliged
to re-draw 152 *l.* 5 *s.* which please honour, and place to our
Debit.

June 20.
1738. Your sundry Draughts shall be taken Care of, but cannot
pay them without re-drawing, until *Nicolson's* Affair is settled,
and then we would with Ease do it; and we hope this, at
farthest, will be finished in two Months: It is in the Hands
of three good Arbitrators.

July 13.
1738. As soon as our Arbitration is finished with *Nicolson*, which
will be, if you can draw at any Distance of Time, before
your next Bills fall due, they shall be all sunk.

Out.

Our Arbitration with *Nicolson* goes on as well as we could with ; it must be finished before the 29th *September*. July 27. 1738.

We were forced to re-draw on you, as our Arbitration with *Nicolson* is not yet ended, but it will now be soon finished, *so an End shall be put to this Trouble*, by our paying what you draw upon us henceforward, without re-drawing. Sept. 7. 1738.

All the above Letters are wrote with the Defender's own Hand.

N U M B E R II.

C A S E

A. Was a Creditor of B. and C. Copartners on their joint Bond, and was also a Creditor of B. on his separate Bond.

A Commission of Bankrupt was some Years ago awarded and issued against B. and C. and A. proved both his joint and separate Debts under the said Commission.

A. received a Dividend of two Shillings and Sixpence in the Pound, in respect of his said Debts, proved under the said Commission, which Dividend was made to the Creditors, out of the separate Estate of B. only, and no Part of the Estate, belonging to the Copartnership, or of the said C. was delivered up, and B. and C. afterwards obtained their Certificates under the said joint Commission, and C. is now able to pay his several Creditors, under the said Commission, their full Debts.

Quer. 1st, Should it be proved that C. made a Concealment of his Estate or Effects, by not disclosing any Interest he had in Possession or Reversion, in the Estate he now enjoys, can the Certificate under the Commission be recalled, and can A. recover what remains due to him in the joint Bonds of B. and C. and on the separate Bond of B. or on either, and which

which of them against C. and how is it advisable for A. to proceed, for Recovery thereof?

Answered. I apprehend, if any of the Creditors of C. can make it appear, that C. at the Time of his last Examination, made any Concealment of his Estate and Effects, to the Value of 10 *l.* and upwards, that it will annul and make void the Certificate as to C. but not in respect of B. unless such Concealment be also with his Privity, and that A. may bring his Action against B. and C. on their joint Bond, and if B. shall plead the Certificate, that A. may notwithstanding proceed against C. who made a fraudulent Concealment, by virtue of the Statute 10. Q. *Ann. cap.* 15, but that A. cannot proceed against B. on his separate Bonds, as B. hath obtained his Certificate, unless in Case of a Concealment, with his Privity.

Quer. 2d. As C. is now in a Capacity to pay his Creditors, under the said Commission, can they compel him thereto, so far as fifteen Shillings in the Pound, out of his present Estate, and how?

Answered. I apprehend, that if C. has rendered the Certificate void against himself by fraudulent Concealment of his Effects, at the Time of his last Examination under the Commission, that all his Creditors are at Liberty to bring Actions at Law against him, for the Recovery of their Debts.

(Signed) FRAN. CAPPER.

Lincoln's Inn, 30th March 1758.

N. B. The above Opinion was taken before bringing this Action.

N U M B E R III.

The late Lord Register's Opinion on this Cause.

I Have considered the Information on the Behalf of *Alexander Blackwood*, Merchant in *Edinburgh*, against *John Cathcart*

cart of *London*. And taking the Facts as therein stated, the general Question is, Whether Mr. *Cathcart's* Certificate does discharge him from the Debts he was liable to before the Act of Bankruptcy, on which the Certificate followed. The Objection to the Operation of the Certificate is a Concealment, to the Value of 10 *l. Sterling*: And there can be no possible Doubt, that, in Law, if this Matter of Fact is proved, the Certificate ceases to be a Bar to any Creditor, prior to the Bankruptcy in *England*. If the Certificate was pleaded in Bar, the Creditor, Plaintiff, would be to reply the Concealment, and, at a Trial, must produce the Plaintiff's Examination before the Commissioners, as the first Step, and prove the Bankrupt possessed or intitled to the Value of 10 *l.* not included in the Examination. *This would be sufficient Evidence to intitle the Plaintiff to a Verdict for his Debt, as being full Proof of his Replication.* But then this Evidence would not be conclusive, because *the Defendant might shew*, that tho' the 10 *l.* Value was not inserted in the Examination, yet he did disclose it at one or other of his Examinations to the Commissioners. *This must be done by legal Evidence*, and nothing is more certain, than that the Bankrupt's Affidavit, nay, his Testimony, could not be admitted, as any Evidence at all, neither could the Affidavits of any other Persons be admitted, but the Persons must be produced in Court, and examined. Therefore I am of Opinion, that neither Mr. *Cathcart's* nor Mr. *Blackwood's* Affidavit ought to be admitted in this Cause.

The first Article of Concealment is the Estate of *Glendusk*, upon which two Questions arise: First, Whether it was concealed, *and there is no Evidence admissible in Law, to prove, that it ever was disclosed.* Secondly, if it was of the Value of 10 *l.* after the Incumbrance upon it was discharged, this falls most properly to be decided in *Scotland*, by the Law of *Scotland*, and Facts best known there.

The next Article of Concealment is the House in *Edinburgh*; and here both the Value, and the Fact seem to be admitted. *The Excuse about Mrs. Campbell can be of no Avail.*
The

The not disclosing the legal Interest, under the supposed Circumstances of giving or rather destinating the Profits to his Sister, is undoubtedly in *Law and Language* a Concealment; and as no Lawyer can maintain such a voluntary Appointment to be good against Creditors, *I am of Opinion this alone vacates the Effect of the Certificate.*

December 29. 1759.

A. HUME-CAMPBELL.

N. B. The above Opinion was taken previous to the Discovery of the 48 *l.* as the Arrears of the Defender's Half-pay.

N U M B E R. IV.

C A S E.

A Person enjoying a Liferent of an Estate, and an Office for Life from the Government, becoming a Bankrupt:

Query. If by the Oath administered to Bankrupts, he is obliged to surrender these, or either, and which of them to his Creditors?

Answer. I am of Opinion, that the Person described is obliged, by his Oath, to discover the Value of any Estate for Life.—As to the Office, I observe that it is not stated, what Office the Bankrupt is entitled to, which will be a material Ingredient in the Answer to this Question: Some Offices being personal Trusts of such a Nature as not to be assignable; and in every Case, if the Office be attended with Labour, Duty, and personal Service, it will be reasonable for the Assignees to consent to give the Party a proper annual Allowance for executing the Office, in the Nature of Agent or Deputy to them, making him to account for the Remainder of the Profits to the Use of his Creditors.

(Signed)

C. YORKE.

December 29th 1761.

